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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

*Petitioners*,

*v.*

MARISA LAGO, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

## RESPONDENTS BOSTON REDEVELOPMENT AUTHORITY'S AND MARISA LAGO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## QUESTION PRESENTED

Whether this Court should deny the Petition for Writ of Certiorari where the United States Court of Appeals for the First Circuit correctly affirmed the Massachusetts District Court's dismissal of the Petitioners' case based on an interpretation of Massachusetts law, and where this case presents a complex and unique intersection of federal statutes and regulations, Massachusetts state law and a consent decree entrered into by the Department of Housing and Urban Development and other parties who are not parties to the instant case?

## LIST OF PARTIES

The Petition correctly lists the named parties in this case, however, the statement that the named Petitioners appear "on behalf of...all other displaced persons from the West End of Boston" is premature and inaccurate. Such class was never certified in this case, and therefore the named Petitioners appear in this case on behalf of themselves only.

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## OPINIONS BELOW

The Opinions Below section of the Petition is accurate with the exception of the reference to proceedings in NAACP v. Kemp, United States District Court, District of Massachusetts, Docket No. 78-850S, and the Petitioners' prior involvement in that case. The Kemp case involved separate parties, and that decision is not subject to review on this Petition.

## STATUTES INVOLVED

This case involves the interrelationship between Massachusetts General Laws Chapter 121B, §49 (citations in this Opposition to Massachusetts General Laws will be referenced as "M.G.L. c."), which is set forth as follows:

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of such sales or leases shall obligate the purchasers or lessees, (a) to devote the land to the use specified in the urban renewal plan for said land; (b) to begin the building of their improvements within a reasonable time; provided, however, that, with respect to any improvements of a type which any federal agency, as defined in subsection (b) of section 3 of the Federal Property and Administrative Services Act of 1949, as amended, is otherwise authorized to make, this clause shall apply to such federal agency only to the extent it is authorized, and funds have been made available, to make the improvements involved; (c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged to

other families for similar or comparable dwelling units built as part of the same redevelopment; and (d) to comply with such other conditions as are deemed necessary to carry out the purposes of this chapter, or requirements of federal legislation or regulations under which loans, grants, or contributions have been made or agreed to be made to meet part of the cost of the project. Nothing in this chapter shall be construed as limiting the power of an urban renewal agency in the event of a default by a purchaser or lessee of land in an urban renewal project to retake title to and possession of the property sold or leased free from the obligation in the conveyance of the lease thereof.

This case also involves federal statutes including 42 U.S.C. §2000d, §3601, §3604 and §3608(e)(5), and federal regulations including 24 C.F.R. §200.610, §200.620 and §850.151(g). The foregoing federal statues and regulations are set forth verbatim in the appendix attached hereto

## STATEMENT OF THE CASE

In 1956 the Boston Housing Authority (the predecessor to the respondent Boston Redevelopment Authority - "BRA") prepared a land assembly and redevelopment plan (the "Urban Renewal Plan") covering several blocks of the West End of the city of Boston (the "Urban Renewal Area"). (Pet.App. 65a.) (Reference to pages in the Appendix to the Petition for Writ of Certiorari will be referenced to herein as "Pet.App. __" ). In 1959 the BRA, in implementing the Urban Renewal Plan, took title by eminent domain to the land comprising the Urban Renewal Area. (Pet.App. 25a.)

M.G.L. c.121B, §49(c), provides (in pertinent part):

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of such sales or leases shall obligate the purchasers or lessees, . . .(c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged to other families for similar or comparable dwelling units built as part of the same redevelopment... M.G.L. c.121B, §49(c).

The same statutory section provides in subsection (d), however, that the urban renewal agency shall obligate the purchasers or lessees:

> ...(d) to comply with...requirements of federal legislation or regulations under which loans, grants, or contributions have been made or agreed to be made to meet a part of the cost of the project.

M.G.L. c.121B, §49(d). M.G.L. c.121B, §49(c) does not provide that the former West End Residents have a "right of return" to the Urban Renewal Area, nor does it provide that they had any right to have affordable housing or *any* housing constructed in the project to facilitate their return to the neighborhood.[1]

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[1] The inclusion of affordable housing as part of the redevelopment of the Urban Renewal Area was a subject of Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority, 289 N.E.2d 867 (Mass. 1972). In that case, the Massachusetts Department of Community Affairs (DCA) asserted that various amendments the BRA had authorized to the Urban Renewal Plan

The eminent domain taking of the Urban Renewal Area occurred over forty years ago. Since that time, and prior to the construction of West End Place, more than 2,200 new housing units were built in the Urban Renewal Area by Charles River Park, Inc. (or, depending on the particular parcel, business entities affiliated with it--collectively "Charles River Park"), the corporation originally designated by the BRA to redevelop the land. See Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority, 289 N.E.2d 867, 878, fn. 9 (Mass. 1972)(hereinafter, "DCA"), which provides an historical background to the redevelopment of the West End Urban Renewal Area. Any "preference" available to the Petitioners under G.L. c.121B, §49(c) was, is, and always has been, available to them and other former West Enders with respect to these units. See Id. at 870.

Despite its construction of over 2,200 dwelling units on the bulk of the land comprising the Urban Renewal Area, however, Charles River Park did not exercise its development rights with respect to one parcel known as Lowell Square, which for years remained the last undeveloped parcel of the West End Urban Renewal Area. As a result, the BRA terminated such rights so that it could designate a new project and new developer for the site. The termination of Charles River Park's development rights became the subject of a lawsuit, in which the BRA prevailed in 1990. See Charles River Park, Inc. v. Boston Redevelopment Authority, 557 N.E.2d 20 (1990).

The BRA designated respondents Lowell Square

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providing for additional housing units to be built in the project were "illegal" due *inter alia* to lack of sufficient provisions for low and moderate income housing. The Massachusetts Supreme Judicial Court ruled that the was no requirement in the West End Urban Renewal Plan that low and moderate income housing be constructed as part of the project. Id. at 879

Associates and Lowell Square Cooperative Limited Partnership (the "Developers") to develop the West End Place project ("West End Place") as a mixed-income, cooperatively owned, housing development. (Pet.App. 26a). The 183 units comprising West End Place are the last of the over 2,300 housing units ultimately constructed in the West End Urban Renewal Area. To finance the project and in order to include low and moderate income housing units, the Developers sought construction grants and other subsidies from the federal government pursuant to various HUD-administered funding programs that existed at that time.[2] Under the terms of such federal programs, however, the grant of funds was conditioned on compliance with a number of requirements premised on federal fair housing statutes and regulations. (Pet.App. 67a); see e.g. 42 U.S.C. §2000d, §3601, §3604, §3608(e)(5), 24 C.F.R. §200.610, §200.620, §850.151(g). In administering these federal housing assistance programs, HUD is charged not simply with ensuring that federal funds would not be used to facilitate segregated housing patterns, but further to affirmatively implement the policies behind the fair housing statutes and regulations. 42 U.S.C. §3608(e)(5). Petitioners in this case neither challenge the validity of those statutes and regulations, nor do they argue that such statutes and regulations do not apply in this case.

In order to even meet the application requirements for the federal funds ultimately used to subsidize the project, the developers had to prepare for HUD's approval an Affirmative Fair Housing Marketing Plan ("AFHMP").

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[2]Federal funding was received from several federal programs, including the Section 8 Community Investment Demonstration Program, enacted by the HUD Demonstration Act of 1993, P.L. 103-20, §6, 107 Stat. 1148, reprinted in 42 U.S.C.S. §1437f, at 50 (Supp. May, 1996), and the HOME Investment Partnership Act of 1990, 42 U.S.C. §§2471 et seq. (Pet.App. 28a).

(Pet.App. 67a); see 24 C.F.R. §200.610. §200.620 (1996). In Boston, the AFHMP requirement was the subject matter of a Consent Decree[3] entered into after a decade long lawsuit against HUD, which was found to have failed to comply with its obligations under federal statutes[4] and regulations by *inter alia* failing to "condition its provision of federal funds. . on construction of affordable integrated public housing." NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 365 (D.Mass. 1989). (See Pet.App. 26a-27a).

The AFHMP was strictly a marketing mechanism designed to attract minority participation in the application process. While the objective of the AFHMP marketing process was to produce a community at West End Place that reflected the racial and economic diversity of the city of Boston at large, it did *not* include any minority quota or set-asides to achieve such goals. Rather, all units were awarded through a strictly race-neutral lottery process. (Pet.App. 27a-29a, 32a-34a).

While acknowledging the difficulties many former West End residents had experienced back in the 1950s, the BRA and the Developers had to comply in a meaningful way with the requirements of federal funding necessary for the mixed-income West End Place project, and necessary for the

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[3]The Petitioners state in their Statement of the Case that the Consent Decree in NAACP, Boston Chapter v. Kemp, No. 78-850, slip op. (D. Mass, March 18, 1996) contains a "sunset clause of March 8, 1996." This is a factual inaccuracy; in fact, the Consent Decree provides only that either of the parties to that lawsuit "may" take measures to terminate the decree after five years; however, the termination is not automatic, and none of the parties have exercised the option to terminate the decree. (Pet.App. 15a-16a).

[4]42 U.S.C §3608(e)(5) requires HUD and its grantees to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter [entitled "Fair Housing"]." (Pet.App. 27a, fn. 3).

creation of the affordable housing units desired by the West Enders. (Pet.App. 48a-49a.) In order to preserve a preferential treatment for former West End residents, and in compliance with M.G.L. c.121B, §49(c), the BRA required the Developers (in the Land Disposition Agreement, which set the terms of the BRA's conveyance of the Lowell Square parcel to the Developers) "to give preference in the selection of Unit Lessees for dwelling units built on the Property to displaced families..." (Pet.App. 29a). In addition, the developer was mandated to comply with the requirements of federal funding for West End Place, and consistent with the provisions of M.G.L. c.121B, §49(d), the BRA made such preference "[s]ubject to the Affirmative Fair Housing and Marketing Plan...." Id.

In order to accommodate the interests of the former West End residents, the Developers included in their AFHMP a set-aside of 55% (101 of 183) of the units to be built exclusively for former West End residents. (Pet.App. 30a). Mechanically, two pools of qualified applicants were created--one comprised of former West End residents and one comprised of the balance of the city of Boston at large. (Pet.App. 32a-33a). The "set-aside" for the West Enders was the only one incorporated into the lottery process. In order to create this special preference for former West End residents, HUD's Assistant Secretary of Housing granted special waivers of HUD regulations, which otherwise would have required that all 183 units be made available to the general public. (Pet.App. 31a).

## REASONS FOR DENYING THE WRIT

The BRA and its former Director, Marisa Lago (collectively hereinafter referred to as the "BRA"), oppose the Petitioners' Petition for Writ of Certiorari. Under the Rules of the Supreme Court, writ of *certiorari* is granted only for "compelling reasons," including such examples cited

in Rule 10 as (a) a United States circuit court of appeals' rendering of a decision in conflict with another circuit court or a state court of last resort, or its extreme departure from accepted and usual judicial proceedings; (b) a state court of last resort's rendering of a decision on an important federal question in conflict with another state court of last resort or a circuit court; and (c) a state court's or circuit court's decision on an "important question of federal law" that has not been (but should be) settled by this Court, or that conflicts with relevant decisions of this Court. See Supreme Court Rule 10. As more fully set forth below, none of these situations is presented in this case, and therefore there does not exist a "compelling reason" for this Court to grant a writ of certiorari.

Notwithstanding the Petitioner's assertion that the First Circuit's decision is on a "collision course" with this Court's controlling precedent," this case turns primarily and fundamentally on discrete issues of state law that are entirely independent of any purported federal question presented by the Petitioner. In particular, the Petitioners' case is entirely dependent on their allegation that, under Massachusetts law, that have an unqualified "statutory housing preference" under M.G.L. c.121B, §49(c) for the housing units which are the subject of this case. As both the Massachusetts District Court, and the First Circuit Court of Appeals have held, however, there is no such absolute "statutory housing preference" under Massachusetts state law. The Petitioners alternatively argue that the state statute, M.G.L. c.121B, §49(c), created a trust for their benefit. This state law claim has also been rejected by the courts below. In this context, this case presents no actual federal question, let alone one sufficiently important to engage this Court's attention. Granting *certiorari* in this case would involve this Court in deciding dispositive state law issues before it could address even address any purported federal issues.

Even if the Petitioners could overcome this obstacle,

*certiorari* would still not be appropriate in this case, which presents a complicated and rare, if not unique, intersection of federal, state, and local statutes and regulations, as well as a previously decided federal lawsuit involving different parties as it applies to the West End Urban Renewal Project, which is highly unlikely to occur again in the future. Any decision in this case would have little or no general application to other litigation.

Given the dispositive state law issues which form the crux of the Petitioners' claims, and further in light of the unique complexity of federal, state and local statutory and regulatory schemes at play in this action, this case most certainly does not present an "important question of federal law" warranting this Court's review.

## I. THE PETITIONERS' CASE IS PREMISED FUNDAMENTALLY ON A PURPORTED ABSOLUTE HOUSING "PREFERENCE" THAT DOES NOT EXIST UNDER MASSACHUSETTS STATE LAW IN THE CONTEXT OF THIS CASE

The crux of the Petitioners' appeal to this Court, as reflected in their Question Presented For Review, is that the BRA and other government respondents "withd[rew]...a statutory housing preference" from them because they "are almost all white." This question as well as the Petitioners' entire Petition for Writ of Certiorari fails to acknowledge that the claimed "statutory housing preference" does not exist under Massachusetts state law in the context of this case. To the contrary, the federal government granted a waiver of the requirements of federal statutes and regulations pursuant to which grants and subsidies for the project were made. These requirements were incorporated into M.G.L. c.121B, §49(d) to grant a special preference to West Enders to 55% of the units, without regard to their race. Thus, as a matter of state law, the purported question presented by the

Petitioners is irrelevant to the ultimate determination of this case.

A. Under Massachusetts State Law, Petitioner's Purported "Statutory Housing Preference" Does Not Exist In This Case.

Under the language of the state statute and under the rulings by both federal courts below, the "preference" the Petitioners assert by reference to M.G.L. c.121B, §49 does not create an absolute right to the 183 units at West End Place. As a matter of state law, the explicit language of §49 mandates compliance with "requirements of federal legislation or regulations under which loans, grants, or contributions have been made...to meet part of the cost of the project." M.G.L. c.121B, §49(d).

The Petitioners, as well as the entire class of former West End residents, have had the opportunity to exercise their rights under M.G.L. c.121B, §49 with respect to over 2,200 new housing units that were constructed within the Urban Renewal Area over the past 40 years by Charles River Park. The Petitioners' contention that they lacked the means to purchase the market-rate Charles River Park units is immaterial and reflects their fundamental misconception of the rights afforded to urban renewal displacees under the statute.

The Massachusetts statute most assuredly does *not* create a "right of return" for displacees of urban renewal. Far from entitling them to affordable housing, §49(c) expressly limits any preferential treatment thereunder to individuals who are able and willing to pay market rate rents and prices for new housing units built in an urban renewal area. With respect to the very project at issue in this case, the Massachusetts Supreme Judicial Court has declared: "at no time has any such requirement [of low income housing] been a part of the West End Plan." DCA, *supra* at 879. Indeed,

there is no requirement that housing be built in the project area; the BRA could have designated it for retail, office, or public space, or even open space, as it in fact did with respect to many parcels. See Id. at 870-71; Charles River Park, Inc., *supra* at 23, fn. 4, 25. Moreover, any preferential treatment to which any specific individual is entitled under M.G.L. c.121B, §49 is subject to the general purposes of the project as constructed. The BRA, for instance, required Charles River Park to include low and moderate income housing for the elderly on one development parcel in the project area. (See, DCA, *supra* at 872, 878). Former West End residents who were not "elderly" could not have exercised any "preference" described in §49, and had no "right of return," with respect to those dwelling units.

Any "preference" to which Petitoners are entitled is no more or no less than that set forth in M.G.L. §49, subject to the terms provided therein and only to the extent such terms are applicable.[5] As a matter of state law, requirements of federal statutes and regulations applicable to funding for the project are explicitly incorporated by the Massachusetts Legislature into §49(d), and preclude the absolute "right of return" the Petitioners allege exists under §49(c).[6] As District Court explicitly held, the housing "preference" under §49(c) is "qualified by the requirements of federal law" under

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[5]As the BRA argued below (Pet.App. 39a), it is not clear that Petitioners even have standing or a private right of action to seek enforcement of their interpretation of M.G.L. c.121B, §49. This statute requires the BRA to obtain certain agreements from private redevelopers. It does not provide for suits of individuals against the BRA.

[6]As the Massachusetts District Court properly observed, "subsection (d) requires conformity with federal law, which in this case does not permit such an unqualified preference" as the Petitioner sought to assert under §49(c). Pet.App. 46a.

§49(d). (Pet.App. 50a).[7] In affirming the dismissal of the Petitioners' case, the First Circuit further noted that the Petitioner had "not challenged" the District Court's ruling that the federal law requirements under §49(d) "qualify the statutory priority" under §49(c). (Pet.App. 77a).

B. In Exercise of its Statutory Duty to Administer M.G.L. c.121B, §49, the BRA Interpreted and Implemented Subsections (c) and (d) Together, and in Doing So Preserved Preferential Treatment for Petitioners in Fulfillment of §49(c).

The BRA applied §49 in a manner that allowed (with the cooperation of HUD[8]) 55% of the units to be reserved exclusively for the former West End residents.[9] This

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[7] In this regard, the District Court also observed that one of the Petitioners (the Old West End Housing Corporation or "OWEHC") acknowledged that "federal law limited the preference that could be given to former West End residents" when it entered into a Participation Agreement with Respondent Lowell Square Associates. (Pet.App. 50a, fn. 18). In the Participation Agreement, OWEHC agreed that such preference was "subject...to applicable...federal laws." Id.

[8] In order to facilitate the BRA's creation of this special set-aside for former West end residents in the face of §49(d), HUD agreed to obtain limited waivers of the strict application of the federal regulatory requirements.

[9] Had the BRA interpreted §49(d) strictly in this case, no set aside or preference would have been created for any racial or ethic class. Rather, all of the 183 units at West End Place would have been offered through a lottery process open to members of the entire Boston community on an entirely race neutral basis. Under the BRA's administration of the statute, 45% of the units were made available to the Boston community at large, while the remaining 55% were reserved exclusively for the West End group of which the Petitioners were a part. Although the BRA's interpretation of the statute in this manner had the *de facto* effect of creating a set aside for a class of persons who are "almost

permitted the West Enders to be given preferential treatment pursuant to §49(c), while at the same time ensuring that, in accordance with §49(d), all of the requirements necessary to obtain the critical federal funding for the West End housing project were met.

Under Massachusetts law, the BRA is charged with the administration of the urban renewal statute, and has been given special statutory authority in this regard to safeguard the public interest in urban renewal projects throughout the city of Boston. DCA, *supra* at 875. In discussing the relevant state law principles at issue in this case, the District Court acknowledged that the BRA is "the agency charged with administration of the statute [M.G.L. c.121B §49]" and that "its reasonable interpretation of legislative intent deserves some deference from the court." (Pet.App. 46a); see Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd., 656 N.E.2d 563, 572 (Mass. 1995); Manning v. Boston Redevelopment Authority, 509 N.E.2d 1173, 1179 (Mass. 1987)("[w]e give substantial deference to the construction placed on a statute or ordinance by the agency charged with its administration.").

Confronted with a potential linguistic conflict between M.G.L. c.121B, §49(c) and (d), the BRA exercised its discretion by implementing the statute in a manner that gave effect to *both* provisions, consistent with the overall statutory scheme. In the first instance, compliance with the requirements of the federal funding regulations, in accordance with §49(d) was paramount. The BRA had to ensure that the conditions and requirements of federal funding required for West End Place housing development were met. Otherwise, these critical federal funds would not

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all white" (i.e., former West End residents, of whom the four Petitioners in this case are a part), it was consistent with the BRA's statutory duty and obligation under Massachusetts law to administer the statute in the public interest.

have been available and the mixed-income project would not have been built.[10] Obviously, had the BRA interpreted §49(c) as granting the Petitioners an absolute right to occupy all units to be constructed, as the Petitioners assert, neither the interests of the public at large *nor the Petitioners* would have benefitted--the housing units at issue would not have been built.

The Petitioners' assertion that the preference available to them was "reduced from 100% to 55%" is factually inaccurate. Rather, the cooperation of the Developers, the BRA and HUD made it possible to create *any* set-aside for former West End residents in the face of federal funding requirements which otherwise, under federal and state law, would have eliminated, as a practical matter, any special treatment for them under §49(c). Moreover, as set forth above, the Petitioners' assertion that the reference to a "preference" in §49(c) provides them with an absolute right to any housing unit built in the Urban Renewal Area is without foundation under Massachusetts law.[11]

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[10] As the District Court noted, if the BRA did not give meaningful effect to the federal regulatory requirements, "the federal government could not legally, and as a practical matter would not, contribute to the project..." (Pet.App. 48a-49a).

[11] Equally unavailing is the Petitioners' suggestion that §49(c) and (d) should have been reconciled by affirmatively marketing the units (in compliance with the AFHMP requirement) only to the former West End residents who were displaced back in the 1950s. As the former West Enders are, by their own admission, "almost all white," applying the AFHMP in this manner would have eviscerated fair housing policies behind the federal statutes and regulations, and would have effectively promoted segregated housing policies--all in contravention of HUD's statutory mandate. As the lower court appropriately observed, "[i]t would be a charade to affirmatively market the units at West End Place to attract minority applicants and then give former West End residents an absolute preference to all of those units because the vast majority of them are white." (Pet.App. 48a).

Although in dicta, the Massachusetts District Court suggested that the BRA's interpretation of the statute in this case is not subject to the degree of deference established by Chevron U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 873, 843 (1984), it nonetheless held that the BRA's interpretation of §49 to give effect to *both* subsections (c) and (d), "constructed the statute in a manner consistent with its language, common sense, and the requirements of federal law." (Pet.App. 49a). In this respect, the District Court held that, regardless of the appropriate degree of deference, "the BRA's interpretation of §49...is not only reasonable, its is right." (Pet.App. 47a).[12]

C. The Petitioners' Assertion That M.G.L. c.121B, §49(c) Creates a Trust for the Benefit of Former West End Residents is Without Basis Under Massachusetts Law, and Presents a Further Issue of Discrete State Law For This Court to Address.

In its Petition, the Petitioners "preserve and press" their argument below that the state statute, M.G.L. c.121B, §49(c), created a trust for the benefit of all former West End residents, which came into being at the time the BRA took title by eminent domain to the Urban Renewal Area back in 1959. As the Massachusetts District Court correctly held in dismissing this claim (as affirmed by the First Circuit Court of Appeals), §49(c) does not create a trust.

Applying Massachusetts state law, the lower courts held

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[12]Indeed, recent developments in this case demonstrate that the BRA's interpretation of §49 produced excellent results. As the brief of the Developer respondents indicates, *all* of the qualified former West End residents were offered units at West End Place. Thus, not only did the BRA's interpretation of §49 facilitate the necessary federal funding for the creation of the mixed-income West End Place project, but also, in the end, allowed every single qualified former West End resident to enjoy preferential treatment under §49(c).

that critical elements of a trust, such as a specific intent to create a trust and the existence of a clearly identifiable trust *res* at the time of creation of a trust, are not met by §49(c).[13] (App 50a-51a). See New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958); Ventura v. Ventura, 555 N.E.2d 872 (Mass. 1990). This determination that §49(c) could not have created a trust by providing for a "preference" to "dwelling units built in the project area" accurately reflects urban renewal law in Massachusetts. At the time the BRA took title to the West End Urban Renewal Area back in 1959, there were no "dwelling units" which could have been held in trust. A number of events (some of them contingent) had to occur *subsequent* to the taking before such a *res* would come into existence. First, the BRA would have had to sell the land to a developer. Second, the land would have to be devoted to residential use, as opposed to various commercial uses, retail uses, government uses, recreations uses or other public uses. Third, even if the land were ultimately devoted to housing, the actual construction of the housing units (*the res)* devoted would have to be accomplished before §49(c) "preference" to such units would apply.

Under Massachusetts law, "there can be no trust unless there is an existing trust res...and that an interest which has not come into existence cannot be held in trust" New England Trust Co., 149 N.E.2d at 602.[14]

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[13]In order to create a trust under Massachusetts law, the following three elements must be present: (1) an intent to create a trust; (2) a clearly defined trust res; and (3) identifiable trust beneficiaries. Bane v. LeRoux, 157 B.R. 500, 509 (Bankr. D. Mass. 1993), citing Ventura v. Ventura, 555 N.E. 2d 872, 874 (Mass. 1990).

[14]At various points, the Petitioner has also suggested that §49(c), in granting a "preference" to urban renewal displacees, further grants an "implied" trust to the former West Enders. This theory also fails. Under Massachusetts law, "public grants must be strictly construed against the

Aside from being incorrect, the Petitioners' assertion that §49(c) creates a trust for the benefit of former West End residents is yet another discrete issue of state law that this court would have to address and resolve if *certiorari* were granted, independent of any purported federal questions the Petitioners have submitted for review. This, again, counsels against the grant of a writ of *certiorari* in this case.

## II. THIS CASE DOES NOT PRESENT A LEGITIMATE FEDERAL QUESTION JUSTIFYING THE GRANT OF A WRIT OF CERTIORARI

The Petitioners' framing of the case to this Court as a clean constitutional question of whether their "statutory housing preference" was withdrawn from them because they "are almost all white" reflects their attempt to mask the lack of substantive merit to their claims.[15] Stitching together a number of isolated quotes from the Circuit Court's opinion where terms such as "race" "racial motive," "whites," "minorities" and "strict scrutiny" are used, the Petitioners assert that this case "is on a collision course with this Court's controlling precedent" in the area of affirmative action. Behind these emotionally charged terms, however, there is

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grantee," Charles River Park, Inc., 557 N.E.2d at 28, and "[n]othing will be included in the grant except what is granted expressly or by clear implication." Id. citing Prudential Ins. Co. of America v. Boston, 369 Mass. 542, 547, 340 N.E.2d 858 (1976).

[15] From the outset of this case, the Petitioners have obfuscated the flaws in their case by asserting vague theories without any clearly defined contours. At the commencement of this action, Petitioners filed what the Massachusetts District Court characterized as a "rather rambling complaint." (Pet.App. 35a). This Court should not attempt to unravel the tangled web of facts and imprecisely joined issues of federal and state law, which form the foundation of the federal question the Petitioners have purported to present.

simply no substance to the Petitioners' purported constitutional question.

As discussed *supra*, the state "statutory housing preference" which forms the crux of the Petitioners' Equal Protection claim is not what they assert it to be. As a matter of state law, any such preference is qualified by the requirements of federal funding for the project, which included several federal fair housing statutes and regulations, as well as the terms of a federal Consent Decree which imposed special conditions on HUD funding in the city of Boston specifically. Rather than confront this fundamental flaw in the premise of their constitutional question, the Petitioners simply ignore it. As the First Circuit noted, the Petitioners "have not challenged" the ruling that "such federal requirements--as a matter of Massachusetts law--qualify the statutory preference." (Pet.App. 77a). Moreover, the Petitioners do not even purport to challenge the validity of the federal fair housing statutes, HUD regulations, or the Consent Decree[16] which operate to qualify their asserted "preference" in this case.

There was no underlying issue of dispositive state law in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct.

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[16] While the Petitioners purport only to challenge the Consent Decree "as applied", however, it appears from their arguments that they are attacking the validity of the Consent Decree itself. The Petitioners for instance argue that the decree is "structurally overbroad," that the district court should have modified it in this case, and that a purported "sunset clause" makes it inapplicable to this case. This back door attack on the Consent Decree is an attempt to circumvent their failure to properly challenge the decree in the NAACP case. Although the Petitioners attempted to intervene in that case, they abandoned that challenge to the Consent Decree when the District Court denied their motion to intervene. The Petitioners did not pursue their challenge by appealing the District Court's decision to the First Circuit. Having allowed its right of appeal in the NAACP case to lapse, the Petitioners, fifteen months later, filed the present action, involving different parties and a different set of facts to, in effect, resuscitate their challenge to the validity of the Consent Decree.

2097 (1995), Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S.Ct. 2997 (1990); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706 (1989) or any of the other cases through which this Court established the constitutional standards for racial preferences, which the Petitioners contend govern the present case. Indeed, this case does not involve a racial preference in the mode of Adarand, Croson and Metro Broadcasting, all of which involved the government distributing benefits in a manner that favored one race to the detriment of others. The AFHMP is simply a marketing tool designed to increase minority participation in the applicant pool, and does not involve a quota, set aside, preference or any other mechanism designed to favor minorities in the actual distribution of the government benefit involved (i.e. the selection of recipients of units). As the First Circuit put it aptly, in reference to the Petitioners' loose use of constitutional terms, "[d]espite the use of the 'racial classification' label, the complaint alleges no facts that would bring that label into play." (Pet.App. 73a).

When one looks behind the veneer of the constitutional language the Petitioner has sprinkled throughout their Petition, it becomes apparent that there is no cognizable federal question meriting review by this Court.

The First Circuit's decision herein is not in conflict with this Court's precedent in the area of racial preferences, under Adarand, Croson and other related cases. The holdings on the legal issues (especially the dispositive state law issues) in this case do not conflict with holdings of other circuits,[17] and the First Circuit certainly did not extremely depart from

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[17]The Petitioners' assertion that the First Circuits decision in this case is in conflict with Lutheran Church v. FCC, 1998 WL 168712 (D.C. Cir. 1998) is similarly without substance. Aside from the fact that the entirely race-neutral lottery process employed in this case for the selection of tenant at West End Place distinguishes this case from Lutheran Church, the District of Columbia Circuit in that case in fact specifically distinguished Raso and in fact approved the court's reasoning. Id. at n.8.

accepted judicial proceedings. Moreover, this case does not involve a decision of a state Court that conflicts with law in other jurisdictions. There are no "compelling reasons" that would warrant this Court's granting a writ of *certiorari*.

## III. EVEN IF THE PETITIONER HAD PRESENTED A COLORABLE FEDERAL CLAIM, THE COMPLEXITIES INVOLVED IN THIS CASE ARE UNIQUE AND ARE UNLIKELY TO REOCCUR IN THE FUTURE

Even aside from the adequate and dispositive state law issues discussed above, this case involves a complex intersection of laws and polices on federal, state, and local levels which are unique to the case and are unlikely ever to occur again in the future. The resolution of these complexities by this Court would produce little precedential value for future cases, and would not materially further the development of principles this Court has established in its prior cases on affirmative action.

As the First Circuit Court of Appeals observed, "we are dealing here with an ad hoc administrative action...prompted not by any general, racially skewed policy toward statutory preferences but by the peculiar interplay of Boston's consent decree, the Massachusetts statute, and the respective racial makeups of the Boston population and the former West Enders."

As the First Circuit indicates, the government bodies involved in this case were confronted with the challenge of integrating the final phases of two separate and complex processes--the evolution of the federal fair housing laws as they apply to the city of Boston and the completion of of an urban renewal project which commenced four decades ago.

In adapting to the evolving circumstances and needs of the community, the government agencies had to address an intersection of federal fair housing statutes and related HUD

regulations, the incorporation of affirmative fair housing governmental policies, the requirements of a state statute (M.G.L. c.121B, §49), and the impact of a federal consent decree rendered in another federal lawsuit that has application to HUD funding of housing in the city of Boston. Indeed, the origins of this case, and of the Petitioners' interests, have to do with an urban renewal plan carried out in the city of Boston over forty years ago, pursuant to a section of the National Housing Act of 1949 which has since been repealed. See 42 U.S.C. §1441 et seq.

The complex circumstances of this case are surely rare, if not unique, and the intersection of so many federal, state and local interests and policies is unlikely to reoccur. Owing to its complicated factual background and uncommon legal issues, this case is not an appropriate one for further consideration by this Court.

## CONCLUSION

For the reasons set forth above, the BRA respectfully requests that this Court deny the Petition for Certiorari in this case.

Respectfully submitted,

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## 42 U.S.C. §2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

## 42 U.S.C. §3601

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

## 42 U.S.C. §3604

**Discrimination in the sale or rental of housing and Other prohibited practices**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful ---

(a) To refuse to sell or rent after the making of bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial, status, or national origin.

(b) To discriminate against any person in the term, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination base on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representation regarding the entry or prospective entry into the neighborhood of a person or person of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f) (1) to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(c) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services for facilities in connection with such dwelling, because of a handicap of --

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes --

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rule, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

(i) the public use and common use portions of such dwelling are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into through the dwelling;
(II) light switches, electrical outlets, thermostats, and other environmental control in accessible locations;
(III) reinforcements in bathroom walls to allow later installation of grab bars; and
(IV) usable kitchens and bathrooms such that an individuals in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1" suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its law the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B)A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwelling, determinations as to whether the design and construction of such dwellings are consistent with graph (3)(C), and shall provide

technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or constructions of all covered multifamily dwellings, to determine whether the design and construction of such dwelling are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints of otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraph (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsections, the term "covered multifamily dwellings" means--

(A) building consisting of 4 or more units if such building have one or more elevators; and

(B) ground floors units in other building consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons

greater access than is required by this subchapter.
(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of otherindividuals or whose tenancy would result in substantial physical damages to the property and others.

**42 U.S.C. §3608(e)(5)**

(e) Functions of Secretary

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter; and

**24 C.F.R. §200.610**

It is the policy of the Department to administer its FHA housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin. Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.

**24 C.F.R. §200.620**

With respect to all FHA subsidized or unsubsidized programs in which the applicant hereafter participates (except for housing for which a conditional commitment has been issued prior to the effective date of these regulations), the applicant shall meet the following requirements or, if he contracts marketing responsibility to another party, be

responsible for that party's carrying out the requirements:

(a) Carry out an affirmative program to attract buyers or tenants, regardless of sex, handicap or familial status, of all minority and majority groups to the housing for initial sale or rental. An affirmative marketing program shall be in effect for each multifamily project throughout the life of the mortgage. Such a program shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex, handicap or familial status or national origin, through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area. All advertising shall include shall include either the Department-approved Equal Housing Opportunity logo or slogan or statement and all advertising depicting persons shall depict persons of majority and minority groups, including both sexes.

(b) Maintain a nondiscriminatory hiring policy in recruiting from both minority and majority groups, including both sexes and the handicapped, for staff engaged in the sale or rental of properties.

(c) Instruct all employees and agents in writing and orally in the policy of nondiscrimination and fair housing.

(d) Specifically solicit eligible buyers or tenants reported to the applicant by the Area or Insuring Office.

(e) Prominently display in all offices in which sale or rental activity pertaining to the project or subdivision takes place the Department-approved Fair Housing Poster and include in any printed material used in connection with sales or rentals, the Department-approved Equal Housing Opportunity logo or slogan or statement.

(f) Post in a conspicuous position on all FHA project sites a sign displaying prominently either the Department-approved Equal Housing Opportunity logo or slogan or statement.

**24 C.F.R. §850.151(g)**

(g) *Affirmative fair housing marketing.* Marketing must be done in accordance with the HUD-approved Affirmative Fair Housing Marketing Plan. Form HUD-935.2. and all fair housing and equal opportunity requirements. The purpose of the Plan and the requirements is to provide for affirmative marketing through the provision of information regarding the availability of units in projects assisted. Affirmative marketing steps consist of good faith efforts to provide information and otherwise attract eligible persons from all racial, ethnic and gender groups in the housing market area to the available housing.